95-665

Supreme Court, U.S.
FILED
OCT 23 1995
CLERK

No.

In The

Supreme Court of the United States

October Term, 1995

JOHN LAWRENCE PHILLIPS, JR.,

Petitioner,

vs.

GEORGE E. PATAKI, as Governor of the State of New York; E. LEO MILONAS, as Chief Administrative Judge of the State of New York, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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7648
Lutz Appellate Services, Inc.
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10 pp

QUESTION PRESENTED

Whether Article 6, Section 25 of the New York State Constitution, and Section 23 of the New York State Judiciary Law, which require mandatory retirement at the age of seventy for state court judges, is constitutional when applied to an elected judge who has only served two years out of his ten year term?

OPINIONS BELOW

Petitioner seeks review of the decision of the United States Court of Appeals for the Second Circuit filed July 24, 1995 which affirmed the judgment of the United States District Court for the Eastern District of New York dated April 17, 1995.

STATEMENT OF JURISDICTION

The District Court entered its judgment on April 17, 1995. The Court of Appeals for the Second Circuit affirmed its decision on July 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any persons of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

The Petitioner was elected to a ten year term as a Civil Court Judge but was forced to retire on December 31, 1994, after having only completed two years of his elected term by virtue of Article 6, Section 25 of the New York State Constitution[1] and Section 23

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1. Article 6, Section 25(b):

> b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New

(Cont'd)

of the New York State Judiciary Law.[2] The District Court ordered his removal from the bench because of his having reached seventy years of age and the Court of Appeals affirmed the decision based upon *Gregory v. Ashcroft*, 501 U.S. 452 (1991)

REASONS FOR GRANTING THE WRIT

The Petitioner, as well as the people of the State of New York who voted for him, have been deprived of equal protection under the Fourteenth Amendment to the United States Constitution. The aforesaid provisions, which required the removal of the Petitioner before he completed his full elected term, are arbitrary and capricious and without rational basis, especially when considering how one's life span has been greatly extended. The Petitioner is a prime example of the vitality most Americans

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(Cont'd)

> York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. . . .

2. § 23. Judiciary Law

> No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age, except that a judge or justice in office or elected or appointed to office at the effective date of this section, as to whom no provision limiting his right to hold Office to the close of the year following his attaining the age of seventy years was applicable prior to the effective date of this section may continue in office during the term for which he was elected or appointed.

enjoy at age seventy and thereafter. He is a martial arts expert who continues to lead an active and vigorous life.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JULY 24, 1995

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

95-7453
Docket Number

JOHN L. PHILLIPS, ET. AL.

Appellants

vs.

MARIO CUOMO

Respondents.

NOTICE OF MOTION

state type of motion

for *Vacate a Section of State of New York Constitution and to Re-instate appellant*

MOTION BY:

John L. Phillips – 155 Herkimer Street, Brooklyn, New York-Pro Se- 718-789,4220

Appendix A

OPPOSING COUNSEL

Oliver W. Williams, Attorney General
120 Broadway, New York, N.Y. 10271
Telephone: 212-416-8000

Has consent of opposing counsel:
A. been sought? *No*
B. been obtained? *No*

Has service been effected? *Yes*

Is oral argument desired? *Yes*
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? *No*
B. by firm date of argument notice? *No*
C. If Yes, enter date: _____

Judge or agency whose order is being appealed:
Judge Allyne Ross

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? *No*
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? *No*
If No, explain why not:

Appendix A

Will the parties agree to maintain the status quo until the motion is heard? *Yes*

Brief statement of the relief requested:
Vacate lower Court's Order removing Appellant from Civil Court Bench because he reached 70 years of age. And permit Appellant to serve out his eight remaining years of his elected term.

By: *(Signature of attorney)*
John L. Phillips –Pro Se, Plaintiff

s/ John L. Phillips 5-31-95

IT IS HEREBY ORDERED that the motion be and it hereby is *denied The Supreme Court has upheld the lawfulness of age-based mandatory judicial retirements*
Gregory v. Ashcroft, 501 U.S. 452 (1991)

s/ illegible
s/ illegible
s/ illegible
Circuit Judge

JUL 24 1995
Date

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK DATED APRIL 17, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

94 CV 2544 (ARR)

NOT FOR PUBLICATION

JOHN LAWRENCE PHILLIPS, JR. et al.

Plaintiffs,

-against-

MARIO M. CUOMO, et al.,

Defendants.

ORDER

ROSS, United States District Judge:

Plaintiff is a 70-year-old man who, because of his age, was required to step down from his elected state court judgeship at the end of last year. The "sole issue" (as plaintiff states in his recently filed "BRIEF STATEMENT OF FACTS") is whether to strike down as unconstitutional Article 6, Section 25 of the New York State Constitution, and Section 23 of the New York State Judiciary Law, which require mandatory retirement at the age of seventy for state court judges.

As I discussed in more detail in my oral opinion when this

action came before me on plaintiff's motion for a preliminary injunction, the United States Supreme Court has held constitutional such state provisions. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Plaintiff has cited no authority to the contrary.

Plaintiff should be praised for his love of public service and his desire to continue working on behalf of the people who elected him for as long as he is physically and mentally able. Because I am bound by the *Gregory* decision, however, I must dismiss this complaint in its entirety. I am confident that, in retirement, Judge Phillips will discover other rewarding ways to serve his community.

SO ORDERED.

s/ Allyne R. Ross
Allyne R. Ross
United States District Judge

Dated: April 17, 1995
Brooklyn, New York